

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-418

DAVID J. ALLEN, trustee,¹

vs.

MARY JANE PERRIN & others.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Defendants Mary Jane and George Perrin appeal from so much of the judgment entered on July 20, 2017, as denied "their motion for attorney's fees."³ We affirm.

David Allen, the trustee of the 179 Main Street Trust (trustee), and the Perrins are adjoining landowners. The trustee filed this declaratory relief action, claiming it holds title to two different and described "disputed areas" lying along the parties' common property line. The Perrins denied the trustee's claims and cross-claimed. Following a bench trial, a Superior Court judge made findings and entered a judgment that

¹ Of the 179 West Main Street Trust.

² George E. Perrin, Jr.; Peter Hartwell.

³ The appeals noticed by the plaintiff and defendant Peter Hartwell were not entered in this court and are not before us.

dismissed the parties' ancillary claims and declared, in substance, that the trustee held title to one of the two disputed areas while the Perrins held the other. The judge also, without comment, denied the Perrins' request for their attorney's fees.

"Massachusetts generally follows the 'American rule' and denies recovery of attorney's fees unless such fee-shifting is authorized by contract, statute, or court rule." Wong v. Luu, 472 Mass. 208, 215 (2015). The Perrins have brought to our attention no contract, statute, or court rule that provides for an attorney's fee award in this case. Asserting that the trustee filed this action in bad faith, the Perrins argue that an award properly could have been made under either G. L. c. 231, § 6F, or an abuse of process theory.

However, the Perrins neither pleaded nor adequately raised either an abuse of process or a § 6F claim below.⁴ As such we

⁴ The Perrins' answer contains neither an abuse of process affirmative defense or counterclaim, nor a § 6F request. The Perrins did not seek leave to amend their pleadings, either pretrial or posttrial. We acknowledge that the Perrins, in the parties' joint pretrial memorandum, summarily requested their "attorney's fees, expert fees, and costs. Abuse of Process and c. 231, Section 6F," but counsel made no argument or other substantive explanation for that request, either in the pretrial memorandum or in opening argument at trial. We also acknowledge that the Perrins' counsel summarily argued, in closing, that, "I don't think there was probable cause for the [trustee's] claims, and that's one of the elements of an abuse of process, that this -- that this claim is . . . meritless. And I'd ask you to find in favor of the defendants." Such unsupported, summary

need not consider the Perrins' present arguments. R. W. Granger & Sons, Inc. v. J. & S. Insulation, Inc., 435 Mass. 66, 73-74 (2001) (it is "axiomatic that an appellate court need not consider a claim" not raised below because "it is important that an appellate court have before it an adequate record and findings concerning a claim to permit it to resolve that claim properly"). We also note that any purported appeal from a § 6F order, had one entered, would not properly be before us. See G. L. c. 231, § 6G ("Any party aggrieved by a decision on a motion pursuant to [§ 6F] may appeal . . . to the single justice of the appeals court at the next sitting thereof").

In any event, the Perrins have identified no record evidence, and our independent review has found none, plausibly suggesting that the trustee pursued his claims "to accomplish some ulterior purpose for which [civil process] was not designed or intended, or which was not the legitimate purpose of the . . . process employed." Beecy v. Pucciarelli, 387 Mass. 589, 595-596 (1982). Moreover, and if for no other reason than that

assertions did not give the trustee fair notice of the Perrins' claim or a meaningful opportunity to address it. Compare Bank v. Thermo Elemental Inc., 451 Mass. 638, 665-666 (2008) (claim for attorney's fees award under G. L. c. 21E, § 4A, must be pleaded specifically). See also Keystone Freight Corp. v. Bartlett Consol., Inc., 77 Mass. App. Ct. 304, 309-310 (2010) (debtor's claim that creditor abused process by filing collection action constituted compulsory cross claim that should have been specifically pleaded and adjudicated in that collection action).

the judge granted the trustee's requested relief in substantial part, were such questions properly before us, we would infer that the judge found the trustee's claims nonfrivolous and properly prosecuted. See Mailer v. Mailer, 390 Mass. 371, 373 (1983) ("the judge's decision imports every finding essential to sustain it if there is evidence to support it"). See also G. L. c. 231, § 6F (fees may be awarded where party's claims "wholly insubstantial, frivolous and not advanced in good faith" [emphasis added]); Redstone v. O'Connor, 70 Mass. App. Ct. 493, 504-505 (2007) (although certain of plaintiff's unsuccessful claims "reflected poor judgment," trial judge properly denied attorney's fees award under G. L. c. 215, § 45, where "the remaining claims . . . presented valid questions of law that required [the judge] to construe the language of the 1959 trust").

To summarize, even though a judge in "rare and egregious cases" may depart from the usual rule and award a party its attorney's fees, Police Comm'r of Boston v. Gows, 429 Mass. 14, 19 (1999), this is not that case.

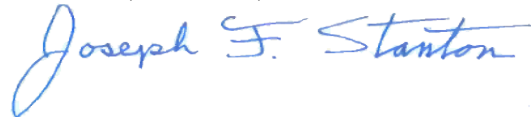
The trustee, characterizing the Perrins' appeal as frivolous, moves for an award of his attorney's fees. The motion is allowed. In accordance with the procedure described in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), the trustee may file an application for fees within fourteen days of the date of

this decision. The Perrins may file a written opposition within fourteen days thereafter.

So much of the judgment as denied the motion for attorney's fees is affirmed.

So ordered.

By the Court (Vuono, Hanlon & Shin, JJ.⁵),



Clerk

Entered: August 15, 2019.

⁵ The panelists are listed in order of seniority.